

ESTTA Tracking number: **ESTTA10449**

Filing date: **06/21/2004**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

### Notice of Opposition

Notice is hereby given that the following parties oppose registration of the indicated application.

#### Opposers Information

<b>Name</b>	Kellogg North America Company		
<b>Granted to Date of previous extension</b>	06/20/2004		
<b>Address</b>	Kellogg North America Company One Kellogg Square Battle Creek, MI 49016 UNITED STATES		

<b>Name</b>	Kellogg Company		
<b>Entity</b>	Corporation	<b>Citizenship</b>	Delaware
<b>Address</b>	One Kellogg Square Battle Creek, MI 49016 UNITED STATES		

<b>Attorney information</b>	Lisabeth H. Coakley Harness, Dickey & Pierce, P.L.C. 5445 Corporate Dr. Troy, MI 48098 UNITED STATES docketingtm@hdp.com, coakley@hdp.com, gdaurini@hdp.com Phone:248 641 1600		
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#### Applicant Information

<b>Application No</b>	78245067	<b>Publication date</b>	12/23/2003
<b>Opposition Filing Date</b>	06/21/2004	<b>Opposition Period Ends</b>	06/20/2004
<b>Applicant</b>	SMALL PLANET FOODS, INC.		

### **Goods/Services Affected by Opposition**

Class 030. First Use: First Use In Commerce:  
All goods and services in the class are opposed, namely: ORGANIC BREAKFAST CEREAL

<b>Attachments</b>	fkv54200.PDF ( 4 pages )
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<b>Signature</b>	/LHC/
<b>Name</b>	Lisabeth H. Coakley
<b>Date</b>	06/21/2004

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**KELLOGG NORTH AMERICA COMPANY  
and KELLOGG COMPANY**

Opposers,

v.

**SMALL PLANET FOODS, INC.**

Applicant.

**Opposition No.** \_\_\_\_\_

Serial No. 78/245,067

Mark: HEARTY MORNING

Filing Date: May 2, 2003

Publication Date: December 12, 2003

**NOTICE OF OPPOSITION**

Kellogg North America Company, a Delaware corporation, located and doing business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016, and Kellogg Company, as assignor to and licensee of Kellogg North America Company, a Delaware corporation, located and doing business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan 49016 (jointly hereinafter "Kellogg"), believe that each will be damaged by the registration of the mark shown in Application Serial No. 78/245,067 in International Class 30, filed by Small Planet Foods, Inc. (hereinafter "Small Foods") on May 2, 2003, and opposes this application on the following grounds:

**PROPOSED TRADEMARK "HEARTY MORNING"  
AND ITS COMPONENTS ARE MERELY DESCRIPTIVE**

1. Commencing long prior to Applicant's filing date, Opposer has engaged, and is now engaged in the manufacture, distribution, sale, advertising and promotion in interstate commerce of food products and related goods and services, including breakfast cereal, identified in Applicant's application.

2. Commencing long prior to Applicant's filing date, Opposer has used, and is

2. Commencing long prior to Applicant's filing date, Opposer has used, and is now using the term "morning" in connection with numerous food products, including those of the type identified as the goods of Applicant's application, sold and/or transported in interstate commerce, as well as in printed recipes for making food products using Opposer's products of the type specified in Applicant's identification of goods.

3. Commencing long prior to Applicant's filing date, Opposer has used, and is now using the term "hearty" in connection with numerous food products, including those of the type identified as the goods of Applicant's application, sold and/or transported in interstate commerce, as well as in printed recipes for making food products using Opposer's products of the type specified in Applicant's identification of goods.

4. Opposer has made substantial investment in advertising and promotional use of the terms "hearty" and "morning" in a descriptive fashion in connection with goods of the type identified in Applicant's application, as have numerous other manufacturers in the same industry. Opposer has extensively used, advertised, promoted and offered goods of the type identified in Applicant's application bearing the terms "morning" and/or "hearty" in a descriptive manner to the general public through various channels of trade in commerce, as have numerous manufacturers in the same industry, with the result that "morning" is used to describe the most frequently targeted time of day for suggested consumption of such products and "hearty" is frequently used to describe products that are intended to appeal to and provide substantial nourishment for a robust appetite.

5. Upon information and belief, notwithstanding Opposer's and the industry's long established prior practice of using the words "morning" and "hearty" descriptively in connection with the same type of goods identified in Applicant's application, on May 5, 2003, Applicant filed an application for registration of the proposed HEARTY MORNING

trademark in which Applicant asserts exclusive rights to use the phrase "hearty morning" in connection with "organic breakfast cereal" in International Class 30. Said application was assigned Serial-No. 78/245,067; and was published for Opposition in the Official Gazette of December 23, 2003.

6. Upon information and belief, Opposer's goods and Applicant's goods are either directly competing or very closely related and will be sold and rendered in close proximity to one another and purchased, consumed and used by the same general class of purchasers.

7. Opposer, upon information and belief, avers that it will be damaged by the registration by Applicant of the alleged HEARTY MORNING trademark, as set forth in Applicant's Trademark Application Serial No. 78/245,067, in that the Applicant has not disclaimed exclusive rights to the unregistrable component "hearty morning", which is a term that is merely descriptive in nature and would, but for Applicant's attempt to exclusively appropriate the term as its own through this trademark filing, likely be used by Opposer and others in Opposer's and Applicant's industry in connection with goods identical to and/or related to the goods sold and promoted to the public by Opposer, just as the individual terms already have been so used.

**WHEREFORE**, Kellogg believes and avers that it is being and will continue to be damaged by registration of the HEARTY MORNING mark and requests that said Application Serial No. 78/245,067 be rejected, that no registration be issued thereon to Applicant, and that this Opposition be sustained in favor of Kellogg.

Kellogg hereby appoints LISABETH H. COAKLEY, Michigan Bar No. 34108, GEOFFREY D. AURINI, Michigan Bar No. 62187, and each principal, attorney of counsel, associate and employee of Harness, Dickey & Pierce, P.L.C. who is an attorney, its

attorney with full power of substitution and revocation, to prosecute this opposition proceeding and to transact all business in and before the United States Patent and Trademark Office in connection herewith. Please address all correspondence to:

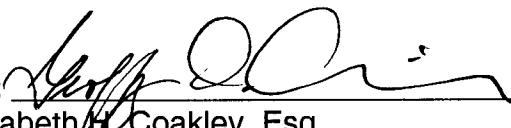
Lisabeth H. Coakley/Geoffrey D. Aurini  
Harness, Dickey & Pierce, P.L.C.  
P.O. Box 828,  
Bloomfield Hills, Michigan 48303  
(248) 641-1600.

The amount of \$600.00 in payment of the requisite opposition fee (\$300.00 per class for each party) specified in 37 C.F.R. § 2.6(a)(17) has been authorized with the electronic filing of this Opposition. The Commissioner is hereby authorized to charge any additional fees which may be required, or credit any overpayments to Deposit Account 08-0750.

Respectfully Submitted,

KELLOGG NORTH AMERICA COMPANY  
and KELLOGG COMPANY

Date: June 21, 2004

By:   
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Geoffrey D. Aurini, Esq.  
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